92-1025

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

IRENE L. TORRES,
Petitioner,

vs.

ASARCO, INC.
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MIKE MILLIGAN
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QUESTIONS PRESENTED FOR REVIEW

1. Is the four-part analysis of *McDonnell Douglas Corp. v. Green*,[1] adequate for a situation in which the alleged discrimination consists of discriminatory denial of retraining for a new position following elimination of an employee's former job?

2. Have the various Courts of Appeals correctly extended this Court's 1986 "Trilogy" concerning summary judgments, to the field of employment law?

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[1] 411 U.S. 792 (1973).

LIST OF PARTIES

The names of all parties to this action appear in the style. Defendant has no parent company and no subsidiaries other than wholly-owned subsidiaries.

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No._____

In The

Supreme Court of the United States

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IRENE L. TORRES,

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vs.

ASARCO, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Irene L. Torres, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 4, 1992.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Neither the opinion of the District Court, nor that of the Court of Appeals, was officially published. The attorney for Petitioner is unaware of any unofficial reports of these opinions.

JURISDICTION

The petition herein seeks review of a Judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 4, 1992. There was no motion for rehearing. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254, subparagraph (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Rule 56, Federal Rules of Civil Procedure, provides as follows:

"SUMMARY JUDGMENT

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse

party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. As amended 1948, 1963, 1987."

STATEMENT OF THE CASE

This case arose from a layoff at Asarco's El Paso Smelter in 1985. Before that, Mrs. Torres, a Hispanic female, had worked at Asarco for about twelve years, the last ten of them in the accounting department, where she was a typist at the time of the layoff.

Before the 1985 layoffs, there were 22 people working in the accounting department. The statistical breakdown by national origin and sex (the two characteristics at issue in this case) was as follows:

Anglo Male	27.3%
Hispanic Male	45.5%
Anglo Female	9.1%
Hispanic Female	18.2%

Mr. Richard Vollmer was the head of the accounting department. After consolidating some positions and transferring some employees to other jobs (for which they required additional training), Mr. Vollmer still had to lay off four of his employees. Mr. Vollmer admitted that he had no written criteria or standards for determining which jobs and employees to eliminate, and he further admitted that subjective factors figured prominently in the decisions he made, such as judgment calls about advancement potential of particular employees. Of the four employees who ended up being laid off, every single one of them was either Hispanic or female, and two of them were Hispanic females. One Hispanic male was also laid off, and not a single Anglo male was laid off or even transferred to another department in the reorganization.

Mrs. Torres testified in her deposition that the Hispanic men who received transfers, rather than being laid off, had to be trained for new positions and that, given the opportunity, she could have been trained for other positions as well. She identified five different jobs she could have performed with the sort of training that Hispanic males received: scale house clerk, maintenance clerk, executive secretary, insurance secretary, and security department.

When Mrs. Torres learned that she was to be laid off, she went to Mr. Vollmer and pleaded with him to transfer her to any other position. Mr. Vollmer insisted that nothing was available and then, most interestingly, went on to point out that Mrs. Torres' husband, David, had a secure job at Asarco and that they lived with her mother.

To summarize, Mrs. Torres' evidence was as follows:

1. There were no objective standards for choosing which employees to lay off.
2. The factors considered by Mr. Vollmer were entirely subjective and apparently included Mr. Vollmer's judgment about advancement potential and the family situations of particular employees.
3. The layoff impacted disproportionately upon employees who were either Hispanic, female, or, most especially, both.
4. The layoffs and even the transfers had absolutely no impact upon employees who were neither female or Hispanic.
5. Hispanic male and Anglo female employees were transferred to positions for which they required training, but this option was not offered to Mrs. Torres.

Despite this evidence, the United States District Court for the Western District of Texas granted summary judgment to the employer, and so Mrs. Torres appealed to the United States Court of Appeals for the Fifth Circuit under the provisions of Title 28, United States Code, Section 1291. That Court affirmed the decision of the District Court in a non-published opinion.

ARGUMENT

There are two elements that make this case important and worthy of consideration by this Court. First, this case presents the issue of discrimination in a new context: alleged discriminatory denial of transfer to a new position during a layoff. The second

element is the increasing use of summary judgment in job discrimination cases.

Employment cases generally fall into fixed categories, such as discharge, failure to hire, or failure to promote. This case is sort of a hybrid, because Mrs. Torres' job was eliminated, and she was not considered for retraining and transfer to another position, even though other persons who were not Hispanic females did receive this consideration. In this factual context, it is difficult to apply the traditional four-part analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

That case required a plaintiff alleging discriminatory failure to hire to prove four elements: (1) That he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. *McDonnell Douglas Corp.*, at 802. In this case, from Plaintiff's deposition testimony, the employer apparently did not require that transferees to new positions be fully qualified, because Plaintiff was able to identify at least five who needed training for their new positions.

Both the Trial Court and the Court of Appeals had obvious difficulty dealing with this fact pattern and regrettably, both Courts apparently resolved their dilemma by simply ignoring key evidence. Instead, both Courts focused upon the fact that Mrs. Torres could identify only one position for which she would have been qualified with no additional training, and that position was filled by another Hispanic female. Neither Court discussed the evidence that Mrs. Torres was denied training for a new position and the circumstantial evidence that this denial was based, at least in part, upon her combination of national origin and sex.

What happened in this case is fairly typical of what happens when economic conditions require downsizing of a large company. Trying to keep as many workers as possible, management often resorts to intra-company transfers, even if the transfer requires additional training. When making tough decisions, not only about positions to eliminate and people to lay off, but also about who gets another chance, with no written objective criteria for the decision-making process, there is a strong possibility that factors will include race, national origin, sex, and other impermissible criteria. Under current law, this problem is so intractable that the Court of Appeals in this case even said there was **no evidence** of the lack of written objective criteria. However, Mr. Vollmer admitted this fact in his deposition.

Granting certiorari in this case would give this Court an opportunity to revisit *McDonnell Douglas* and establish standards for its applicability to the wrenching and difficult decisions that must be made in a layoff or reduction in force. Employers have a natural tendency, in those situations, to be as compassionate as they can to the employees affected. But it is vital that there be standards to ensure that this compassion is not shown in a discriminatory manner.

The difficulty of applying existing precedent to this case is also apparent, in a more general way, from the summary disposition of this case by the lower Courts. The District Court granted summary judgment, and the Court of Appeals summarily affirmed, without hearing oral argument and without publishing an opinion. The perfunctory treatment of this case by the lower Courts seems oddly inconsistent with the strong evidence of discrimination, but that is the nature of summary judgment. The similarity of nomenclature to a summary court martial under the Articles of War is instructive. A summary court martial dispatches a clearly guilty soldier or

seaman; a summary judgment dispatches a clearly unmeritorious case.

The widespread use of summary judgment by the lower Federal Courts is a more or less direct response to three decisions of this Court in 1986, popularly known as "The Trilogy;" *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Matsushita Electric Universal Corp. v. Zenith Radio*, 475 U.S. 574 (1986). Before 1986, the Fifth Circuit expressed strong reluctance to utilize summary judgment in employment law cases, pointing out the necessity in such cases of proving intent by circumstantial evidence and the difficulty of evaluating that sort of thing on paper rather than in the courtroom. See, e.g., *Thornburg v. Columbus and Greenville Railway Company*, 760 F.2d. 633, 640-641 (5th Cir. 1985).

Since The Trilogy, there are hardly any cases displaying such reluctance. On the contrary, in the Fifth Circuit at least, summary disposition of employment law cases is the rule, rather than the exception. See, e.g., *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d. 805 (5th Cir. 1991); *Barrow* v. *New Orleans S.S. Ass'n.*, 932 F.2d. 473 (5th Cir. 1991); *Spiller* v. *Ella Smithers Geriatric Center*, 919 F.2d. 339 (5th Cir. 1990); *Hilton* v. *Southwestern Bell Tel. Co.*, 936 F.2d. 823 (5th Cir. 1991); *Larry* v. *White*, 929 F.2d. 206 (5th Cir. 1991); *Boze* v. *Branstetter*, 912 F.2d. 801 (5th Cir. 1990); and *Tolbert* v. *United States*, 916 F.2d. 245 (5th Cir. 1990).

And yet none of the cases in The Trilogy was an employment law case. *Celotex* was a products liability case; *Anderson* was a suit for libel; *Matsushita* involved an alleged conspiracy in violation of the antitrust laws. None of these are the types of cases where a plaintiff can invoke any strong public policies in his favor. In fact, in libel cases, it is the defendant who can invoke one of the strongest public policies ever recognized: freedom of speech.

By contrast, the various laws that undertake to address discrimination in the workplace all have remedial purposes and

express a public policy against the discrimination which these statutes prohibit. It is axiomatic that the effectiveness of these statutes depends upon the willingness of courts and juries to grant relief on the basis of circumstantial evidence. The summary judgment procedure has a natural and unavoidable tendency to denigrate circumstantial evidence and thus undermine the effectiveness of these beneficent laws.

The only way an employment discrimination plaintiff can avoid summary judgment is by first putting his entire case on paper and then making, in effect, his closing argument about all of the inferences he feels the Court should draw from the circumstantial evidence. By moving for summary judgment, the employer can obtain a highly valuable insight into the mental impressions, conclusions, opinions, and legal theories of the plaintiff and his attorney. Ordinarily, these would enjoy a high degree of protection from disclosure under Rule 26(a)(3) of the Federal Rules of Civil Procedure. A lawyer facing a motion for summary judgment has little choice but to reveal all of his best arguments.

Granting review in this case would give this Court an opportunity to write about the efficacy of the summary judgment procedure in employment law cases and to prevent further erosion of the important laws that protect American workers.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

IRENE L. TORRES,

Plaintiff,

vs.

ASARCO INCORPORATED,

Defendant.

ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a civil action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* Plaintiff Irene Torres was formerly employed in the accounting department of the Defendant Asarco Incorporated. Her employment was terminated as part of a reduction in force in 1985. In her complaint, she alleges that she was the victim of discrimination because of her sex (female) and national origin (Mexican-American). The Defendant has filed a motion for summary judgment.

The Plaintiff was first employed by Defendant's El Paso smelter in 1973. In 1985, she was assigned as one of the two stenographers in the accounting department. In September 1985, due to economic conditions in the copper industry at that time, ASARCO suspended operation of its El Paso smelter. Over 200 hourly employees were

laid off. The Plaintiff's employment was not directly affected by this action. However, ASARCO next moved to reduce the salaried work force at the El Paso smelter. It offered voluntary early retirement to certain employees who were eligible for the program. It then proceeded to implement a reduction in force, resulting in the termination of nineteen salaried employees on October 31, 1985. The termination of the Plaintiff's employment was part of this reduction in force. In the accounting department to which she was assigned, one Hispanic male, one Anglo female, and two Hispanic females, one being the Plaintiff, were selected for termination. The positions previously occupied by these four employees were eliminated, and the duties previously performed by these employees were merged and consolidated into the positions of retained employees.

In her first amended complaint, the Plaintiff alleges that the Defendant discriminated against her in various ways. First, she claims that she should have been retained after the reduction in force because she was qualified to perform other jobs and had more seniority than other employees. Second, she claims that the Defendant failed to establish written criteria for determining which employees would be selected for termination in the reduction in force. Third, she claims that she did not receive the same pay and benefits as an Anglo employee with less seniority and ability. Finally, she claims that the Defendant discriminated against female employees by finding new positions for male employees after the reduction in force and not doing the same for female employees.

Summary judgment is often an inappropriate tool for resolving claims of employment discrimination, which typically involve nebulous questions of motivation and intent. *Thornbrough v. Columbus and Greenville Railway Company*, 760 F.2d 633, 640 (5th Cir. 1985); *Gunner v. Chevron U.S.A. Inc.*, 684 F. Supp. 916, 919 (E.D. Tex. 1988). On the other hand, a plaintiff's subjective belief that he or she has been the victim of discrimination, no matter how strongly or genu-

inely felt, is not sufficient to make out a prima facie case of discrimination. *Thornbrough v. Columbus and Greenville Railway Company, supra* at 644 n. 16; *Elliott v. Group Medical and Surgical Service,* 714 F.2d 556, 557 (5th Cir. 1983); *Gunner v. Chevron U.S.A. Inc., supra* at 919.

To make out a prima facie case in the typical discriminatory termination case, the Plaintiff must show that (1) she is a member of a protected group; (2) she was qualified for the job she held; (3) she was discharged; and (4) after her discharge, the employer filled the position with a person not a member of the protected group. *Vaughn v. Edel,* 918 F.2d 517, 521 (5th Cir. 1990). Because of the particular fact situation involved in the instant case, the fourth element of the prima facie case could be more accurately stated that after Plaintiff's's discharge employees who did not belong the protected group were transferred to consolidated positions rather than being terminated. *Vaughn v. Edel, supra* at 521.

The Plaintiff in this case has succeeded in establishing the first three elements of her prima facie case. She was a member of two protected groups (female and Hispanic), she was qualified for the job she held, and she was discharged. The fourth element is the key. The question is whether employees who were not members of the protected group were retained while the Plaintiff was chosen for termination. Unfortunately for the Plaintiff, this is where her prima facie case flounders. The summary judgment proof shows that a total of seven employees in the accounting department were transferred to other jobs rather than being terminated. The seven included four Hispanic males, one Anglo male, one Hispanic woman, and one Anglo woman. Certainly no discrimination against Hispanics is evident, because four of the five men and one of the two women transferred are Hispanic. Nevertheless, the Plaintiff claims that sex discrimination was involved because the Defendant found more new positions for males than it did for females. However,

when pressed on the subject at her deposition, the Plaintiff was able to identify only one retained or consolidated job for which she was qualified. The position was that of insurance secretary (Deposition of Irene Torres, pp. 59-60). However, this position was filled by Irma Escarciga, also an Hispanic female (Deposition, pp. 59-60). In other words, the Plaintiff has been unable to produce any evidence of sex or national origin discrimination other than her own subjective beliefs.

The Plaintiff also alleges that the Defendant failed to establish written criteria for determining which employees would be selected for termination in the reduction in force. The lack of written criteria may be an indication of discrimination. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 242 (5th Cir. 1974). However, the Plaintiff has made no attempt to produce any evidence as to how the lack of written criteria resulted in sex or national origin discrimination against her. She was required to do so, because a party opposing a motion for summary judgment may not merely rest on the allegations of her complaint, but must point to specific facts showing that a genuine issue exists for trial. *Celotex Corporation v. Catrett*, 477 U. S. 317, 323 (1986); *Slaughter v. Allstate Insurance Company*, 803 F.2d 857, 860 (5th Cir. 1986).

The Plaintiff next alleges that she did not receive the same pay and benefits as an Anglo employee with less seniority and ability. In her deposition, the Plaintiff explains that she is referring to Edith Vollmer, a clerk in ASARCO's maintenance department (Deposition pp. 63, 67). In other words, the Plaintiff is alleging discrimination in compensation based upon national origin. To establish a prima facie case, the Plaintiff has the burden of showing that she and Mrs. Vollmer were similarly situated and that she had substantially the same responsibilities as Mrs. Vollmer. *DeWeist v. Tarleton State University*, 704 F.Supp 705, 708 (N.D. Tex. 1987), *affirmed* 845 F.2d.

1021 (5th Cir. 1988), *cert. denied* 488 U. S. 927 (1988). At the time of the Plaintiff's discharge, she had been a full-time stenographer for only three years and her duties included routine office work, such as making copies and other clerical work. On the other hand, Mrs. Vollmer has been in her position as maintenance clerk since 1974, and her job responsibilities include auditing the maintenance labor distribution tickets and specific pieces of equipment so that maintenance reports and cost accounting functions can be performed (Deposition of Edith Vollmer, p. 7). The Plaintiff admits that she has nothing but her beliefs and feelings to prove that the difference in salary between her position and that of Mrs. Vollmer was due to national origin discrimination (Deposition of Irene Torres, p. 67). The Plaintiff can point to no specific evidence of discrimination, and it appears from the summary judgment record that the Plaintiff and Mrs. Vollmer were not similarly situated. The Plaintiff has failed to establish the existence of a genuine issue of material fact with respect to this claim.

After reviewing the summary judgment evidence, the Court finds that there is no genuine issue of material fact, and that the Defendant is entitled to summary judgment in its favor as a matter of law. The following orders should be entered.

It is ORDERED that the Defendant's motion for summary judgment in the above-styled and numbered cause be, and it is hereby, GRANTED.

It is further ORDERED that judgment be, and it is hereby, ENTERED in favor of the Defendant, and that the Plaintiff take nothing by her suit.

SIGNED AND ENTERED this 31st day of December, 1991.

HARRY LEE HUDSPETH,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

IRENE L. TORRES,
Plaintiff,

v.

ASARCO INCORPORATED,
Defendant.

NO. EP-88-CA-445-H

JUDGMENT

In accordance with the order regarding summary judgment this day entered,

It is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, ENTERED in favor of the Defendant, and that the Plaintiff take nothing by her suit.

SIGNED AND ENTERED this 31st day of December, 1991.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
No. 92-8058
(Summary Calendar)

IRENE R. TORRES,
Plaintiff-Appellant,
versus
ASARCO INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(EP-88-CV-445)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.
PER CURIAM:*

Irene Torres brought suit against Asarco, Incorporated, alleging sex and national origin discrimination. Asarco filed a motion for summary judgment, which the district court granted. Torres appeals. Finding no error, we affirm.

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Torres, an Hispanic female, commenced her employment with Asarco in 1973 working part-time in the smelter Asarco operates in El Paso, Texas. Torres was later transferred to the Clinic -- where her duties included doing paperwork, and helping dispense band-aids and aspirin. After working at the Clinic, Torres was transferred to the "Keypunch" division of the accounting department where she worked full-time entering data into a computer. Later, Torres was moved from Keypunch to work half-day as a receptionist at the switchboard and half-day in the typing room. In 1982, another typist retired, and Torres was assigned to the full-time position of stenographer in the accounting department. In September of 1985, due to economic conditions in the copper industry, Asarco suspended operation of its El Paso smelter. Consequently, 200 Asarco hourly employees -- approximately one-half of its workers -- were laid off. Because Torres was a salaried employee, she was not then directly affected by the action taken in September of 1985. Subsequently, however, Asarco reduced the salaried work force at the El Paso smelter. First, Asarco offered a voluntary early retirement option to eligible employees.[1] Asarco then implemented a reduction in force, and nineteen salaried employees were terminated. Richard Vollmer, the financial manager in charge of the accounting department, determined that he could achieve the appropriate size work force by eliminating the jobs of the five employees who retired and doing the same with four additional jobs. Of the four accounting department employees who were terminated, one was an Hispanic male, one was an Anglo female, and two were Hispanic females -- including

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[1] Five employees in the accounting department chose this option: Robert Covington, Viviano Villalobos, Jesus Perez, Maria Ballesteros, and Glenna Perkins.

Torres. The positions these individuals held were eliminated, and the duties the employees performed were merged and consolidated into positions for the retained employees.[2]

Torres filed suit pursuant to the Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, alleging that she was discriminated against because of her sex (female) and her national origin (Mexican-American). In her First Amended Complaint, Torres alleges that Asarco discriminated against her in various ways. First, Torres contends that Asarco should have retained her after the reduction in force because she was qualified to perform other jobs and she had more seniority than other employees. Second, Torres claims that Asarco did not have written criteria to determine which employees to terminate and which employees to transfer to different departments. Third, Torres claims that she did not receive the same benefits and pay as an Anglo employee with less seniority and ability. Lastly, Torres claims that Asarco discriminated against female employees by finding new positions for male employees, and not doing the same for female employees. Asarco moved for summary judgment, and the district court granted Asarco's motion. Torres now appeals.

II

Summary judgment is appropriate if the movant demonstrates that there "is an absence of genuine issues of material fact." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Such a showing entitles the movant to judgment as a matter of law. Fed. R. Civ. P. 56(C).

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[2] The seven accounting department employees who were transferred to consolidated jobs (assigned additional duties from eliminated jobs) within the accounting department were: Hector Martinez; Edgar Guerry; Marsha Ramirez; Ricardo Rivera; Irma Escarciga; Sergio Casteneda; and Joseph Smith.

The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which reveal that there are no genuine material fact issues. *See Celotex Corp. v. Catrett*, 477 U. S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Once the movant produces such evidence, the nonmovant must then direct the court to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *See id.* at 323-24, 106 S. Ct. at 2553. In considering Asarco's challenge to this summary judgment, we review the record de novo. *See Topalian*, 954 F.2d at 1131.

Torres first contends that Asarco should have retained her after the reduction in force because she was qualified to perform other jobs and she had more seniority than other employees. To establish a prima facie case of discrimination, Torres must show that: (1) she is a member of a protected group; (2) she was qualified for the job she held; (3) she was discharged; and (4) the employer filled the position with a person not a member of the protected group. *See Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990). In this case, with respect to the fourth element, Torres must show that, after she was discharged, employees who did not belong to the protected group were transferred to consolidated positions rather than being terminated. *See id.*

Torres has established the first three elements of her prima facie case. She is a member of two protected groups (female and Hispanic); she was qualified for the job she held; and she was discharged. Torres has, however, failed to establish the fourth element of the prima facie case --that is, that employees who were not members of the protected group were retained while Torres was terminated. The summary judgment proof shows that seven accounting department employees were transferred to other jobs instead of being terminated. These seven employees included four Hispanic males, one Angle male, one

Hispanic woman, and one Anglo woman.[3] Torres fails also establish the existence of discrimination against Hispanics because, of the seven transferred employees, four of the five men and one of the women were Hispanic. Torres also claims, however, that sex discrimination was involved because Asarco found more new positions for males that it did for female employees. At her deposition, Torres identified only one retained or consolidated position for which was qualified:[4] the position of insurance secretary. This position was filled by Irma Escarciga, also an Hispanic female.[5] Accordingly, we find that Torres failed to establish that Asarco transferred to consolidated positions for which Torres was qualified persons who were not members of the protected group, and she failed to establish a prima facie case of either sex or national origin discrimination. *See Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990).[6]

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[3] See *supra* note 2.

[4] Torres testified that there were a number of jobs that she could have learned to perform had she been given trained [sic] for them, but she testified that, at the time of her termination, she was not qualified for any position other than the secretary insurance position assumed by Escarciga.

[5] Before the reduction-in-force, Irma Escarciga had worked as an assistant to Richard Vollmer's personal secretary – Marie Ballesteros. Ballesteros elected the early retirement option in 1985. Rather than fill her position after Ballesteros retired, Richard Vollmer decided to eliminate her position by combining the duties of that position with those of Escarciga's position. Richard Vollmer considered Torres for the combined position, but concluded that Escarciga was better qualified.

[6] Our holding on Torre's first claim is also dispositive of Torre's fourth claim that Asarco discriminated against female employees by finding new positions for male employees, and not doing the same for female employees. Again, we note that, after the reduction-in-force, the only job for which Torres was qualified was filled by an Hispanic female. Therefore, we find that Torres failed to establish a prima facie case of discrimination with respect to this claim.

Torres next contends that Asarco failed to establish written criteria in order to determine which employees would be selected for termination. Without directly addressing the question whether the absence of written criteria per se evidences that Asarco discriminated against Torres, we note that, in opposing Asarco's motion for summary judgment, Torres offered no summary judgment evidence to show how the alleged non-existence of an Asarco written policy resulted in sex or national origin discrimination against her. Indeed, with respect to this claim, in her response to Asarco's summary judgment motion, Torres states only "[t]hat the Company did not have an established written policy on the reduction-in-force, transfer and/or discharge." Record on Appeal, vol. 1, at 13, *Torres v. Asarco, Inc.*, No. 92-8508 (5th Cir. Filed Feb. 14, 1992). The nonmovant's burden on summary judgment is well-established: he or she must direct the court to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *See Celotex Corp. v. Catrett*, 477 U. S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986); *Topalian v. Ehrman*, 954 F. 2d 1125, 1131 (5th Cir. 1992) ("non-movants [may not] rest upon mere allegations made in their pleading without setting forth specific facts establishing a genuine issue worthy of trial") (citations omitted). We find therefore that Torres failed to present an issue worthy of trial with respect to her assertion that "the Company did not have an established written policy on the reduction-in-force, transfer and/or discharge." Record on Appeal, vol. 1, at 13,.

Torres contends also that she did not receive the same benefits and pay as an Anglo employee with less seniority and ability. To establish a prima facie case of discrimination in compensation based on national origin, Torres must show that: (1) she belongs to a protected group; (2) she was similarly situated to other employees who did not belong to a protected group; (3) certain actions were taken with respect to the terms and conditions of Torres's employ-

ment which were not taken against similarly situated non-protected employees under similar circumstances. *See DeWeist v. Tarleton State Univ.*, 704 F. Supp. 705, 708 (N.D. Tex. 1987), *aff'd*, 845 F.2d 1021 (5th Cir.), *cert. denied*, 488 U. S. 927, 109 S. Ct. 313 (1988).

Because she is an Hispanic and a female, Torres is a member of two protected groups and she therefore has established the first element to prove a prima facie case of discrimination in compensation. As for the second element, at her deposition, Torres explains that she was referring to Edith Vollmer -- a clerk in Asarco's maintenance department. To be similarly situated, employees must have similar responsibilities. *Id.; see also Bourque v. Powell Elec. Mfg. Co.*, 45 F. Supp. 125, 129 (S. D. Tex. 1977), *aff'd*, ___ F.2d ___ (5th Cir. 19__) (jobs must require substantially equal skill, effort, and responsibility). Edith Vollmer was hired in 1974 as a maintenance clerk in the maintenance department and she worked in that department at the time Torres filed this lawsuit. As a maintenance clerk, Edith Vollmer's responsibilities included auditing the labor distribution tickets and specific pieces of equipment so that maintenance reports and costs accounting functions could be performed. Record on Appeal, vol. 1, at 98. Asarco hired Torres in 1973 and Torres has subsequently occupied various positions at Asarco. At her deposition, Torres testified that, at the time of her termination, as part of her duties in the accounting department (which she had performed for three years), she handled "the bills of lading, the retirement checks, the telex, the mailing, [and she was] in charge of the IBM copier and typing for the accounting department." Record on Appeal, vol. 1, at 46. According to Richard Vollmer, Torres also handled the typing room functions, "which consisted of doing the mail, stuffing envelopes, stamping the mail, maintaining the copy machine and running copies, typing various documents, bills of lading, reports, sending Telex messages on the Telex machine." Record on Appeal, vol. 1, at 77. We find that the record contains no evidence that Torres

and Edith Vollmer were similarly situated. Accordingly, we hold that Torres has failed to establish a prima facie case of discrimination with respect to compensation.

III

For the foregoing reasons, we AFFIRM.

92-1025

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

IRENE L. TORRES, *Petitioner*,

v.

ASARCO, INC., *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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No._____

In The

Supreme Court of the United States

October Term, 1992

IRENE L. TORRES,

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vs.

ASARCO, INC.,

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respondent, ASARCO Incorporated, respectfully requests that Petitioner's petition for writ of certiorari be denied.

STATEMENT OF THE CASE

Torres has made several assertions in her statement of the case which are unsupported by the record and has omitted several important facts. Therefore, for the purposes of this proceeding, ASARCO Incorporated ("the Company") offers the following abbreviated statement of facts.

Petitioner ("Torres") is an Hispanic female who worked in various clerical positions in the Company's El Paso smelter from 1973 to 1985. In 1985, the Company suspended operations of its lead smeltering plant in El Paso because of severe economic losses. As a result of the shutdown, over 200 hourly employees were laid off. The Company also reduced its salaried workforce of which Torres was a member. The salaried staff reduction was accomplished through a voluntary retirement program and then through the elimination of jobs and consequent termination of employees. In the accounting department, where Torres worked, five employees chose the early retirement option, thus eliminating five job positions. The Company then decided to eliminate four additional clerical positions, including Torres' stenographer position. Of the four employees who were terminated when their jobs were eliminated, one was an Hispanic

male, one was an Anglo female, and two (including Torres) were Hispanic females.

The duties of the nine positions that were eliminated in the accounting department were consolidated or merged into other jobs. Seven accounting department employees were then assigned or transferred to the consolidated job positions. Of these seven employees, four were Hispanic males, one was an Anglo male, one was an Anglo female, and one was an Hispanic female. None of these employees required or was provided training for the consolidated jobs, and Torres did not testify or present any other evidence that these employees received such training.

After the elimination and consolidation of jobs in the accounting department, only one job remained for which Torres, by her own admission, was qualified. That position was the combined secretary-insurance clerk position. That position, however, was assigned to Irma Escarciga, another Hispanic female, whom the Company considered better qualified for the position than Torres.

ARGUMENT

Petitioner Has Asserted No Valid Reasons Why Certiorari Should Be Granted

"A petition for writ of certiorari will be granted only when there are special reasons therefor." Sup. Ct. R. 10.1. Conflicting decisions among federal courts of appeals, conflicting decisions among state courts of last resort, or the need to settle an important question of law are the types of reasons which justify review of a federal appellate court decision on certiorari. *Id.*; *see also Braxton v. United States*, 500 U.S. ___, ___, 111 S. Ct. 1854, ___, 114 L. Ed. 2d 385, 391 (1991) (principal purpose of certiorari jurisdiction is to resolve conflicts among federal courts of appeals and state courts concerning federal law). The questions presented by Torres in her petition for writ of certiorari, however, do not implicate any of these factors and, consequently, do not merit review on certiorari.

This is a simple employment discrimination case in which Torres claims that she lost her job because of her sex and national origin. Torres' first question presented is whether the well-accepted allocation of proof for employment discrimination cases articulated in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and its progeny

is adequate for a situation in which the alleged discrimination consists of discriminatory denial of retraining for a new position following elimination of an employee's former job. At the outset, the claim which predicates this question was not presented to either the district court or the court of appeals. Torres' complaint to the district court alleged that she was terminated because of her sex and national origin in violation of Title VII. She made no allegation that she was denied retraining. The question she presented to the Fifth Circuit Court of Appeals for review was whether the district court erred in holding that the circumstantial evidence she presented to support her claim of unlawful termination was insufficient to raise any genuine issue of material fact. Neither court was asked to determine the question presented to this Court, and indeed, there was no evidence before either court that would have allowed them to do so. Accordingly, the question presented to this Court and the claim underlying it have never before been raised. Even so, there is nothing that justifies this Court in reviewing it now.

This Court and appellate courts from all circuits have long recognized that, in a case lacking direct evidence of discrimination, the allocation of proof articulated in *McDonnell Douglas* and its

progeny represents the classic and most common form of proof in employment discrimination cases. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). In *McDonnell Douglas*, the Court developed a tripartite allocation of proof which first requires the plaintiff to establish a prima facie case of discrimination. The prima facie case, of course, creates a presumption or inference of discrimination which can be rebutted if the defendant articulates a legitimate, nondiscriminatory reason for the decision at issue. If the defendant does articulate a legitimate, nondiscriminatory reason, the plaintiff must prove that the reason is pretextual or somehow unworthy of belief. 411 U.S. at 802-05. The first hurdle a plaintiff must clear, though, is the establishment of a prima facie case. Failure to do so is grounds for summary judgment. *See Pace v. Southern Railway System*, 701 F.2d 1383, 1390 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); *see also Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 645 n.19 (5th Cir. 1985) (failure to establish prima facie case generally means there are no material facts at issue).

In *McDonnell Douglas*, which involved a discriminatory failure to hire claim, the Court concluded that the plaintiff could establish a prima facie case by showing that (1) he belonged to a protected group; (2) he applied and was qualified for an available job; (3) despite the plaintiff's qualifications, he was rejected; and (4) after rejection, the employer continued to seek applicants. 411 U.S. at 802. Torres argues that this formulation for a prima facie case is not suitable for her claim. Courts have long recognized, however, that the specific prima facie formulation found in *McDonnell Douglas* was never meant to be "rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577. Thus, courts have modified the *McDonnell Douglas* formulation to fit a variety of discrimination claims. *See, e.g., Laurence v. Chevron U.S.A.*, 885 F.2d 280, 283 (5th Cir. 1989) (promotion); *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989) (discipline); *Dwyer v. Smith*, 867 F.2d 184, 190 (4th Cir. 1989) (discharge); *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987) (demotion); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (retaliation).

On two occasions, the Fifth Circuit has even formulated versions of the *McDonnell Douglas* prima facie case to address discrimination claims, such as the one asserted by Torres in her complaint to the district court, arising from a layoff during a reduction in force. In *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. Unit B Sept. 1981), *cert. denied*, 455 U.S. 943 (1982), the Fifth Circuit reasoned that a prima facie case of discrimination in a reduction in force could be established if the plaintiff could: (1) show that she is a member of a protected class; (2) show that she was qualified to assume another position with the defendant at the time of the reduction in force; and (3) and produce some evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate against the plaintiff. *Id.* at 129. Later in *Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990), the Fifth Circuit formulated a somewhat different prima facie case for a discrimination claim arising out of a reduction in force layoff. Under that formulation, the plaintiff must show that: (1) she is a member of the protected group; (2) she was qualified for the job she held; (3) she was discharged; and (4) other employees who were not members of the protected class remained in similar positions. *Id.*

at 521. Both the district court and Fifth Circuit Court of Appeals used the *Vaughn* formulation to analyze Torres' claims in this case. Therefore, contrary to Torres' claim that *McDonnell Douglas* is difficult to apply, it instead provides a flexible approach, one that is easily adaptable to evaluate employment discrimination claims of all sorts, including the claims asserted by Torres in this case. There is absolutely no reason to revisit *McDonnell Douglas* to determine whether it still provides an adequate formulation of the burden of proof in employment discrimination cases or to reject the district court's and the court of appeals' reliance upon that case, given its established history of assisting plaintiffs like Torres prove discrimination. This case then simply does not present an issue worthy of this Court's valuable time and attention.

Torres' second question presented to this Court is whether summary judgment is appropriate in employment discrimination cases. Summary judgment is a procedure designed to eliminate claims which have no factual basis before trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). No court has ever held that summary judgment cannot be used to eliminate unmeritorious employment discrimination claims. There are clear reasons for this. A plaintiff who cannot show

that genuine issues of material fact exist with respect to her employment discrimination claim is no more entitled to proceed to trial than a plaintiff who cannot present genuine issues of material fact with respect to a products liability, libel, or conspiracy claim. Federal courts have certainly recognized this, having granted summary judgment in employment discrimination cases, just as in any other case, where there are no genuine issues of material fact which would justify the lawsuit's proceeding to trial. *See, e.g., Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 814 (5th Cir. 1991); *Pace v. Southern Railway System*, 701 F.2d 1383, 1392 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983). In fact, the Fifth Circuit Court of Appeals, in a decision in which it reversed a granting of summary judgment, recognized that the "salutary function of summary judgment in the employment discrimination arena [is that it] allows patently meritless cases to be nipped in the bud ...." *Thornbrough*, 760 F.2d at 645 n.19.

The present case illustrates the appropriateness of summary judgment in employment discrimination cases. Here, Torres was one of four employees laid off from the Company's accounting department during a reduction in force in 1985. She claims, however, that she

should not have have been laid off but should have been transferred to another position like some other employees were. The undisputed evidence before the district court showed that seven accounting department employees were transferred to other jobs instead of being terminated. These seven employees included five Hispanics and two females and none required retraining. Moreover, the *only* position Torres was qualified to perform after the reduction in force was the position of insurance secretary, which was occupied by Irma Escarciga, an Hispanic female. Thus, Torres presented absolutely no evidence even suggesting that she was treated unfavorably or differently because of her sex or national origin. As a result, she failed to present a genuine issue of material fact, making it unnecessary for her lawsuit to proceed to trial. Therefore, summary judgment served its purpose in this case, just as it does in other employment discrimination cases. There is, quite plainly, no reason that merits this Court's review of whether summary judgment is an inappropriate procedure to nip unmeritorious employment discrimination claims in the bud.

CONCLUSION

For the foregoing reasons, the Company requests that the Court deny Torres' petition for writ of certiorari.

Respectfully submitted,

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